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Supreme Court of the United States.

OCTOBER TERM, 1906.

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No. 168.

J. CHARLES McGUIRE AND WILLIAM McGUIRE,
PLAINTIFFS IN ERROR,
vs.
LOUIS GERSTLEY AND WILLIAM GERSTLEY, SURVIVING PARTNERS OF THE FIRM TRADING AS ROSSKAM, GERSTLEY & COMPANY.

BRIEF FOR DEFENDANTS IN ERROR.

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LAW REPORTER PRINT, WASHINGTON, D. C.

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Statement of the Case.

This action was commenced in the Supreme Court of the District of Columbia, by Rosskam, Gerstley & Company, a copartnership, against John F. Monaghan and J. Charles McGuire, as principals, and John W. Clark and William McGuire, as sureties, to recover on a bond, dated September 11, 1903, conditioned for the payment within four months after the date of each respective purchase, for all merchandise purchased from the plaintiffs by the principals. The declaration alleges the purchase by the principals (Monaghan and McGuire) between the dates of September 24, 1903, and July 27, 1904, of merchandise aggregating $14,497.16, upon which credits aggregating $9,100.48 were made, leaving a balance of $5,396.68 overdue and unpaid. The last purchase made was July 27,

1904, and the suit was filed December 10, 1904, more than four months thereafter.

The defense is in the form of eight pleas, the first two being joint pleas of J. Charles McGuire, one of the principals, and William McGuire, one of the sureties, and the other six being separate pleas of said William McGuire. The two joint pleas and the first separate plea are pleas of set-off; the others are, in effect, pleas in confession and avoidance.

By the first and second pleas, the defendants allege that the plaintiffs are indebted to them in the sum of $10,000.00 damages sustained by the breach of an agreement, the obligatory part of which is that on August, 25, 1903, **the plaintiffs agreed with Monaghan and McGuire, the principals, that plaintiffs would sell said firm, whenever requested, "and for certain prices then specified and agreed upon"** the merchandise required in said business and **would allow said firm a continuous credit of $10,000.00.**

The following is assigned as a breach of this contract:

That the plaintiffs on December 10, 1903, wrongfully and with intent to destroy the business of said firm, drew on them for $1,500.00 of their account and on December 11, 1903, wrongfully refused to furnish merchandise to said firm at the prices aforesaid. And on January 13, 1904, refused to furnish any more goods under said agreement and forced said firm to abandon their business, which they had established at an expense of $10,000.00 and in which their profits were very great, whereby the plaintiffs destroyed their credit and business to their damage in the sum of $10,000.00.

By the third plea (numbered one, Rec., p. 7) the defendant, William McGuire, one of the sureties, claims $5,000 damages because he says that the performance

by the plaintiffs of the agreement set up in the first and second pleas was the consideration for which he became surety, and that by reason of their failure to perform, Monaghan and McGuire, the principals, were prevented from paying for the merchandise, whereby he has incurred great liability, and has been damaged to the extent of $5,000.

By the fourth and fifth pleas (numbered two and three, Rec., pp. 8 and 9) the defendant, William McGuire, says he ought not to be charged, because, on September 11, 1903, before the making of the bond sued on, **plaintiffs agreed to sell Monaghan and McGuire merchandise "at certain prices and terms;" that on December 11, 1903, and March 23, 1904, plaintiffs entered into other agreements with Monaghan and McGuire without the knowledge or consent of defendant, by each of which the terms and prices were changed to defendants' prejudice.**

By the sixth plea (numbered four, Rec., p. 10) the defendant says he is discharged as to all except $1,517.07, **because $3,859.61 worth of the merchandise sold, was sold at prices in excess of those which the plaintiff had agreed by letter of August 25, 1903, should be charged for the merchandise, and that of the balance $10,617.55** was sold upon terms mentioned in the letter; $9,100.48 has been paid, leaving $1,517.07 due.

By the seventh plea (numbered five, Rec., p. 10) defendant says that the **bond was delivered to the plaintiffs on certain conditions to be performed by the plaintiffs and which were violated, wherefore he is discharged.**

By the eighth plea (numbered six, Rec., p. 11), defendant says that the bond was delivered to the plaintiff for the purpose of establishing and maintaining the credit of

Monaghan and McGuire with the plaintiffs; **that plaintiffs enticed and induced Monaghan to withdraw from the firm and enter their employ, whereby the business of Monaghan and McGuire was destroyed and they were unable to pay for the merchandise and defendant was discharged.**

A demurrer to all of the pleas was sustained and was followed by a judgment which was affirmed by the Court of Appeals.

ARGUMENT.

The only questions raised by the assignment of errors are: The sufficiency of the declaration, and the sufficiency of each of the pleas as a defense thereto. In the District of Columbia, whence this case arose, Code pleading, as practiced in many of the States, is unknown, the courts administer the law according to the common law rules of pleading, save where those rules have been modified, in a few instances, by statute or rule of court. The elementary rules found in Chitty, Saunders, and Tidd, are still followed here, and applied with somewhat more strictness than they generally are in those jurisdictions where the entire pleadings consist of a complaint and an answer. It is still necessary that every pleading shall tend to the production of an issue that shall be material, single, certain, and unambiguous. Testing the pleas in this record by these rules, it will appear that they fall short of each and every requirement of good pleading; they are obscure in part, insensible in part, repugnant in part, entirely uncertain and prolix, and tender facts that would produce an immaterial issue if traversed. Some of these objections to the pleas being matters of form and assailable by motion to strike out (the modern substitute for the special demurrer at common law), would not be adverted to were they alone the vices of the pleas,

but it is necessary, in studying these pleas, to regard carefully the form, in order to ascertain the elusive substance. This characterization will be found not too severe, as will be shown in their analysis hereafter.

The Declaration.

The declaration alleges the execution and delivery of the bond in suit, profert of which is made, whereby the obligors bound themselves to the plaintiffs in the sum of $5,000.00, conditioned to be void if the principals named thereon should pay or cause to be paid, the moneys due and to become due the plaintiffs for merchandise, then and thereafter purchased, when and as the same should become due and payable; the time payable is stated by way of recital in the bond to be "in four months after the date of each respective purchase." The declaration alleges that on the days set forth in the particulars of demand, which are made a part of the declaration—that is to say, from September 24, 1903 to July 27, 1904—the principal obligors purchased from the plaintiff, merchandise aggregating $14,497.16, upon which payments aggregating $9,100.48 had been made, leaving a balance of $5,396.68; the last purchase was made July 27, 1904, and the action was commenced December 10, 1904, more than four months thereafter. Nonpayment of this balance is assigned as a breach of the condition of the bond.

This not only states a cause of action, but states it with all the technical accuracy of Chitty.

Chitty's Pleading, Vol. I, p. 363, Vol. II, p. 437.

It will be argued by counsel on the other side that the declaration is defective because it fails to state that the merchandise was sold by plaintiffs to the principals on a four months' credit. If the bond provided that the merchandise was to be sold on such a credit, the objection

would be hypercritical, but it does not in terms so provide; it simply binds the principals primarily and the sureties secondarily, to pay for all merchandise sold by the plaintiffs to the principals (on *any* credit, or no credit at all, we say) in four months after the date of each purchase. The contract is not to pay for all goods sold on a four months' credit, but to pay at the end of four months, for all goods purchased of plaintiffs by the principals. It fixes the time when liability commences, not the terms upon which the goods were to be sold. Aside from this, however, whether the goods were sold in terms on a four months' credit, or not, the principals actually received, as appears from the particulars of demand, four months' time on the balance in dispute.

THE PLEAS.

The First and Second Pleas of J. Charles and William McGuire, and First Separate Plea of William McGuire.

(*a*) The defense made in these pleas is, in form, set off, and is evidently predicated upon the theory that for a breach of contract to furnish merchandise indefinitely on credit, the injured party can recover the value of his business, the profits he might have made therein, and damages for injury to credit reputation. It has been repeatedly held that such damages are too conjectural and remote to be remediable. In the case of Levy vs. Sayle, 52 Ark., p. 246, suit was brought on a promissory note held by Sayle and Company against Levy, the answer admitted the execution of the note, but said the indebtedness was contracted under an agreement with plaintiffs whereby they agreed to furnish him, during the year 1885, goods and merchandise to the amount of $1,250, to assist him in carrying on his business; that, after plaintiff had furnished goods to the amount of

$242.03, they demanded his note at 90 days, which he gave, and which was the note in suit; that, afterwards, plaintiffs demanded another note, and, upon defendant's refusing to give it, they refused to furnish him any more goods and circulated the report that he had defaulted in his commercial paper, thereby injuring him in his credit; that defendant had made contracts to supply various planters, based on the contract with plaintiffs, and had suffered damage thereby.

The court, in affirming a judgment sustaining a demurrer to the answer, adopted the language of Judge Campbell in a similar case (Coleman *vs.* Galbreath, 53 Miss., 303) as follows:

> "He may recover any loss directly traceable to the breach of contract by the other party and fairly within the contemplation of the parties, as a result from such breach of contract, and which could not, by reasonable effort, have been avoided by the parties disappointed."

And goes on to say:

> "The question here is, do the allegations of the defendant's answer bring him within the rule? The contract itself furnishes no guide for the measure of damages, and the recoupment by the defendant could be only nominal and inappreciable in the absence of allegations of actual, substantial loss arising from the violation of the contract."

This case, just cited, is simply an application of the principle that **the damages recoverable under a contract must be the natural and proximate result of the breach of the contract or such as are in contemplation of the parties at the time the contract is made.**

Sedgwick Damages 8th Ed. Sec., 146.

The withdrawal of credit by one merchant does not necessarily or naturally result in commercial disaster to the merchant from whom it is withdrawn ; the failure might be attributable to a multitude of cooperating causes. It would be a result too remote to be regarded as the normal consequence of the withdrawal of credit.

Sedgwick Dam., Section 123 :

Loss of custom, credit, and business are too conjectural and remote to be considered as proper elements of damage.

Sedgwick, sections 127 and 175:

> "When the law does not imply that the plaintiff sustained damage by the act complained of, the resulting damage should be shown with particularity. And whenever the damages sustained have not necessarily accrued from the act complained of, and consequently are not implied by law, then in order to prevent the surprise on the defendant, which might otherwise ensue on the trial, the plaintiff must in general state the particular damage he has sustained, or he will not be permitted to give evidence of it."

Sedgwick Section 1261:

The measure of damages for breach of a contract to deliver merchandise is the difference between the contract price and the price paid on open market.

> Lilgengren Furn. Co. *vs.* Meade, 42 Minn., 420.
> Hitchcock *vs.* Turnbull, 44 Minn., 475.

(*b*) The agreement is not alleged to have been in writing and as a pleading is taken most strongly against the pleader, it must be assumed that it was verbal. **An agreement to furnish a continuous credit is an agreement not to be performed within a year and must be in writing.**

Section 1117, Code D. C., provides as follows:

> "No action shall be brought whereby to charge any executor or administrator upon any special promise to answer damages out of his own estate, or whereby to charge the defendant upon any special promise to answer for the debt, default, or miscarriage of another person, or to charge any person upon any agreement made upon consideration of marriage, or upon any contract or sale of lands, tenements, or hereditaments, or any interest in or concerning them, or upon any agreement that is not to be performed within the space of one year from the making thereof, unless the agreement upon which such action is brought, or some memorandum or note thereof, shall be in writing, which need not state the consideration, and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorized."

(*c*) The prices and terms upon which the merchandise was to have been sold, are not set forth and the pleas are vague and indefinite in all their allegations. **A plea of set-off must disclose a state of facts such as would entitle the party pleading to an action if he were suing as plaintiff, and must contain the substance, at least, of a declaration.**

Crawford *vs.* Simonton, 7 Port. Ala., 110.
Waterman, Set-off Sections, 646, 648.
Garrett *vs.* Love, 89 N. C, 205.
Encyc. Pl. and Pr., vol. 19, p. 754.

A plea of set-off, containing facts which would entitle the defendant to nominal damages only, is insufficient; it will not even affect the matter of costs.

Hitchcock *vs.* Trumbull, 44 Minn., 475.

The first and second pleas of the defendants, J. Charles McGuire and William McGuire, commence by alleging

that the plaintiffs were, and still are, indebted to the defendants, John F. Monaghan and J. Charles McGuire, for that, etc.; they then set up a contract with Monaghan and McGuire jointly made for their joint benefit; they then allege a breach, and conclude as follows: Whereby, etc., "*the said Monaghan and McGuire were, and each of them was, thereby injured and damaged in the sum of ten thousand dollars ($10,000), for which sum the said J. Charles McGuire claims judgment, etc.*" By this plea J. Charles McGuire, one of the joint promisees under the alleged contract, which is indivisible, is asking for a several judgment in his favor alone on a cause of action, the title to which is in Monaghan and himself. **Where a promise is made to two or more jointly all the promisees must join as plaintiffs in an action for the breach thereof.**

Amer. & Eng. Encyc. Pl. & Pr., vol. 15, 528.

Set-off is an action.

Code D. C., sec. 1565.

The demand set off must be due to the defendant only.

Amer. & Eng. Encyc., 2d ed., vol. 25, 520.
Waterman on Set-off, section —.

These principles are not affected by the provisions of section 1568, Code D. C., which are only declaratory of the general law, allowing a surety to set off any claim which the principal himself might set off; the surety may not set off a claim in favor of one of two principals for whom he is surety any more than the principal himself may. A judgment in favor of J. Charles McGuire against Rosskam, Gerstley & Company for the excess claimed by him would be no bar to an action by Monaghan and McGuire on the same cause of action.

The third plea of set-off, which is the first separate plea of William McGuire, the surety, is plainly vicious, in that it attempts to set off a demand in his favor alone in an action against himself and three others.

A cause of action in favor of a surety alone can not be set off in a suit against principal and surety.

Corbett *vs.* Hughes, 75 Iowa, 281.
Am. & Eng. Encyc., 2d ed., vol. 25, 540.

There is a further objection to the first separate plea. In this plea, William McGuire, one of the sureties, says that he has suffered damages to the extent of $5,000 because, by reason of the breach of a contract, between plaintiffs and the principals, the principals were unable to pay the debt secured by their bond, and therefore he, the surety, became liable for it, and being liable for the sum of $5,000.00, he is damaged $5,000.00. If this be the theory of the plea, the legal principle should be stated thus: The surety becomes discharged the moment his liability accrues. A bond given to indemnify a merchant against the insolvency of his customer becomes worthless the moment his customer becomes insolvent. Instead of the surety indemnifying the obligee against the insolvency of the principal, the obligee, if he would hold the surety, must maintain the solvency of the principal. Or, to state the rule with more analogy to the theory of this plea, if an obligee in a bond enter into a contract with the principal in the bond and break that contract, the natural and probable consequence of that breach will be to cause damage to the surety. The absurdity of these propositions is manifest in their statement.

Second, Third, and Fourth Separate Pleas of William McGuire.

(Record, pp. 8, 9, and 10.)

These pleas are open to the same objections as those treated above and are further objectionable in that they purport to state the legal effect of one agreement upon another, without stating the terms of either. The failure to set out with certainty the terms and conditions of the agreements referred to in the pleas, makes it impossible for the court to determine whether or not there was any change in the contract of such a nature as to operate as a discharge of the surety. **The allegation of the pleader as to the effect of a contract which is not set forth in the pleading is the allegation of a conclusion of law.**

Encyc. Pl. & Pr., 12, 1038.

Fifth Separate Plea of William McGuire.

(Record, p. 10.)

The violation of a collateral agreement, such as that set up in this plea, does not operate as a discharge of surety. **A bond can not be delivered to the obligee, in escrow, or upon a condition not expressed in the instrument itself.**

Newman *vs.* Baker, 10 App. D. C., 187.

Sixth Separate Plea of William McGuire.

(Record, p. 11.)

This plea has been treated by counsel and the court below as a plea of set-off, and as a plea of recoupment; it is in form, neither, and is insufficient in substance to meet the requirements of either.

No action lies for terminating a partnership at will.

Karrick *vs.* Hannaman, 168 U. S., 328.

A defense by way of recoupment must arise out of the same contract or suit on which the plaintiff relies to make his case.

Van Buren *vs.* Diggs, 11 How., 461.

A tort is not the subject of set-off under our statute.

> "Mutual debts and claims under contract between the parties to a common law action, or between any of the several defendants and the plaintiff, or between one party and the testator or intestate of the other, or between the testators or intestates of both parties, may be set off against each other by plea in bar, whether said debts or claims be of the same of a different nature or degree, and whether the claims be for liquidated debts or unliquidated damages for breach of contract; and if either debt be in the form of the penalty of a bond the exact sum to be set off shall be stated in the plea."
>
> Section 1563, Code D. C.

All of the Pleas Considered Together.

There is a vital objection to all of the pleas that has not been touched upon in considering them separately. To admit evidence in support of these pleas would be to vary by parol the terms of the bond sued on. It must be remembered that the condition of the bond is to pay for merchandise to be purchased by Monaghan and McGuire to the extent of $5,000.00 and its plain purpose was to secure the payment of any balance for merchandise bought by them of Rosskam, Gerstley & Company, irrespective of the terms or conditions upon which the merchandise was obtained or the prices paid or contracted to be paid for it. **The bond is silent as to terms upon which the merchandise was to be bought.** This was a matter very properly left to the

contracting parties to determine. If evidence were admitted to show that the merchandise was to be purchased at certain prices, we would be interpolating into an instrument which is plain, complete, and unambiguous on its face, a new condition limiting materially the liability of the parties to it.

"When a contract is couched in terms which import a complete legal obligation, with no uncertainty as to the object or extent of the engagement, it is (in the absence of fraud, accident or mistake) conclusively to be presumed that the whole engagement of the parties and the extent and manner of their undertaking were reduced to writing. Whether the written contract in this case fully expressed the terms of the agreement between the parties was a question for the court; and silence on a point that might have been embodied in it does not open the door to parol evidence in that regard."

Seitz *vs.* Brewers' Refrigerating Co., 141 U. S., p. 510.

It is true that any material alteration in or deviation from the terms of the contract for whose performance the surety is bound, will, if made without the consent of the surety, release him from his obligation; but here the terms of the contract, for whose performance the surety is bound, are set out in the bond, and that contract, as appears by the bond, is to pay for merchandise, not to pay a fixed or definite price for them. Had the condition of the bond been to pay for any balance that might become due for whiskey sold to Monaghan and McGuire at seventy-five dollars ($75) per barrel, and no whiskey was sold to them at that price but at a higher or lower price, the rule of *strictissimi juris* as applied to the liability of a surety would doubtless be a defense, but

there is no room for such a contention here, as no prices are fixed by the bond. Moreover, the contract referred to in the pleas are independent from the contract evinced by the bond sued on.

An alteration or modification of an independent or subsidiary agreement can not affect the surety's liability.

Domestic Sewing Machine Co. *vs.* Webster, 47 Iowa, 357.

Amicable Mut. Ins. Co. *vs.* Sedgewick, 110 Mass., 163.

Stutz *vs.* Stranger, 60 Ohio St., 384.

U. S. Glass Co. *vs.* Matthews, 61 U. S. App., 542.

The obligation created by the bond in suit is not to guarantee the performance of some agreement that may or may not have existed between the principals and the obligees, but to indemnify the obligors to the extent of $5,000.00 for any loss they might sustain by selling merchandise to the principal debtors; there is nothing in the bond about prices and it is immaterial to the sureties under the liability assumed what prices were charged for the merchandise.

In the case of Domestic Sewing Machine Co. *vs.* Webster et al., 47 Iowa, 357, the action was on a bond conditioned for the payment of every indebtedness which then or thereafter might exist on the part of Webster to the Domestic Sewing Machine Company; the surety pleaded that at the time of executing the bond an agreement was entered into between the Domestic Sewing Machine Company and Webster whereby Webster was appointed general agent of the company, upon certain terms as to compensation, shipment of goods, credit, etc.; that after the bond was executed, the company and Webster entered into another agreement,

materially changing the first agreement. In affirming a judgment on demurrer to this plea, the court said:

> "It is alleged that defendant executed the bond to secure the performance of the agreement and for no other purpose. It is very apparent that the obligation which defendant alleged he assumed is quite different from the one which upon the face of the bond he appears to have assumed. . . . It is quite true that a written agreement may be embraced in several separate papers, and, when it becomes apparent that such is the case, all must be construed together, in order to discover the intention of the parties. But the bond and the agreement referred to have no necessary relation to or dependence upon each other. It is quite reasonable that plaintiff should have entered into the contract with Webster, referred to in the answer, and that Wright should have become surety; that Webster would pay to plaintiff every indebtedness or liability then existing, or thereafter incurred. Neither the bond nor the agreement provides or implies that the plaintiff and Webster might not change the terms of contract existing between them. The law imposes no restriction upon such change in the absence of any valid agreement that it shall not be made. Frank *vs.* Edwards, 8 Exch., 214; Sanderson *vs.* Aston, 8 Law Rep., Exch., 73. It is claimed, however, that it was agreed between the plaintiff and surety that the liability of the latter should be measured by an agreement made contemporaneously with the execution of the bond between plaintiff and Webster. We have already seen that the bond and the agreement have no necessary relation to or dependence upon each other. Each in itself constituted a distinct and complete agreement; neither in any manner refers to the other. If any relationship exists between them, it must be established by parol testimony. This is what the plaintiff claims the right and asks that he may do; he claims that he may show by parol, for it does not appear in any other manner, that

the contract between plaintiff and Webster enters into and measures the extent of his contract with plaintiff; in other words, that he did not agree that Webster should perform the conditions named in the bond, but simply that he should perform certain other conditions mentioned in a separate contract. It is clear that if this is permitted, a contract will be substituted for the bond in many respects essentially different from what the bond upon its face imports. This certainly would violate the rule that 'parol contemporaneous evidence is inadmissible to contradict or vary the terms of a valid written instrument.' True, the contract which it is sought to inject into the bond is in writing, but the fact that it was intended to constitute a part of the bond, if it appears at all, can appear only by parol testimony. We feel satisfied that the bond can not be so modified or varied. If the surety deemed a continuation of the terms of the agreement between the plaintiff and Webster material, he should have stipulated for such continuation in the bond."

Respectfully submitted.

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